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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

TCI CABLEVISION, INC., COMMUNITY TELE-COMMUNICATIONS, INC., and TELE-COMMUNICATIONS, INC.,
*Petitioners,*

*—against—*

CENTRAL TELECOMMUNICATIONS, INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

1. Does the First Amendment prohibit a court from holding, solely on the basis of a finding that the local cable television market is a "natural monopoly", that a municipality may curtail a cable television publisher's right to continue to publish and may appoint another cable television system as the exclusive cable publisher for the municipality?

2. Were Petitioners improperly denied independent appellate review of the record in view of the First Amendment rights at issue?

3. If exclusive licensing of cable speech is constitutional, were Petitioners' attempts to persuade a local legislative body to renew their cable television license, even if done with intent to achieve an exclusive franchise, protected by the *Noerr-Pennington* doctrine?

4. Did the court of appeals err in permitting the jury to find a fact by inferring causation from circumstances that had not been proved, but rather were themselves inferred?[1]

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[1] We ask the Court to consider this question only in the event the Court grants the writ as to the third question presented.

## PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF THE PETITIONERS

The list of parent companies, subsidiaries and affiliates of the petitioners is printed in the Appendix at pages 126a-39a.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners TCI Cablevision, Inc., Community Tele-Communications, Inc. and Tele-Communications, Inc. ("TCI") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on August 26, 1986.

## OPINIONS BELOW

The decision of the Eighth Circuit sought to be reviewed is reported at 800 F.2d 711, and is printed in the Appendix at pages 1a-37a (cited hereafter as "App. ").

The opinion of the district court denying TCI's motion for judgment n.o.v., for a new trial and for a stay of execution is reported at 610 F. Supp. 891, and is printed in the Appendix at pages 38a-71a.

The opinion of the district court denying TCI's motion to dismiss the antitrust claims but granting its motion to dismiss claims brought under 42 U.S.C. § 1985(3) is reported at 589 F. Supp. 85, and is printed in the Appendix at pages 72a-81a.

## JURISDICTION

The district court entered judgment on January 25, 1985, which is printed in the Appendix at page 84a. TCI timely filed motions for judgment notwithstanding the verdict or for a new trial on February 1, 1985. The district court entered amended judgments on May 29, 1985, and June 5, 1985, which are printed in the Appendix at pages 85a and 87a, and denied TCI's post-trial motions by order entered June 5, 1985, which is printed in the Appendix at page 86a.

The judgment of the Court of Appeals was entered on

August 26, 1986, and is printed in the Appendix at page 82a. TCI timely filed a petition for rehearing and suggestions for rehearing en banc on September 19, 1986. The petition was denied by order entered October 16, 1986, which is printed in the Appendix at page 83a.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment. The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15. The text of those constitutional and statutory provisions are printed in the Appendix at pages 99a-101a.

## STATEMENT OF THE CASE

This case arises from a heated political contest over the right of a cable television publisher to continue to publish in Jefferson City, Missouri (the "City"), and presents profound questions involving government interference with First Amendment rights and the scope and application of the *Noerr-Pennington* doctrine.

TCI owned and operated a cable television plant in Jefferson City providing cable television service to that City for a number of years prior to the events here involved. Pursuant to municipal policy, TCI was required to renew its nonexclusive cable television license. TCI sought to persuade voters and municipal officials that its license should be renewed.

Respondent Central was founded, with a capitalization of approximately $59,000, for purposes of obtaining an exclusive franchise at the expense of TCI's right to continue to publish.[2] Central sought to persuade municipal officials that, notwithstanding TCI's First Amendment right of equal access to

[2] The ultimate equity available to be invested in Central was between $316,000 and $540,000.

communicate via cable, it should be permitted to replace TCI. Central maintained throughout that it could not and would not perform under any franchise unless TCI and every other applicant were excluded. Eventually, TCI was able to renew its license. Central did not seek a concurrent nonexclusive license. Instead, Central sued TCI and the City, alleging, among other things, the denial of its First Amendment rights as a cable television publisher. (App. 95a-98a)

Central contended that TCI had coerced the City to grant it a franchise by a series of exclusionary acts, which Central claimed subverted the selection process engaged in by the City (over TCI's objections). After a 31 day trial (and 2 hours, 46 minutes of deliberations), the jury found that TCI and one or more City officials had conspired to restrain competition in violation of §1 of the Sherman Act. It further found that TCI had monopolized the cable market in Jefferson City, and that TCI had tortiously interfered with an economic expectancy of Central in violation of state law. The jury awarded more than $35 million in damages to Central based upon the claimed value of Central's proposed system in the third year of operation under an *exclusive* franchise.

The Eighth Circuit Court of Appeals, in reviewing the verdict, relegated cable speech to the lower standard of First Amendment protection accorded to broadcasting publishers, despite the fact that two other circuits had already rejected such a standard as unsupportable in the cable television field—a rejection subsequently joined by the Federal Communications Commission. The court further held that a cable publisher's right to free speech may be curtailed solely on the basis of a purported "natural monopoly" in the market to be served, while refusing even to review independently the evidence on the issue of natural monopoly. The Court of Appeals for the District of Columbia has firmly rejected that result, and principles enunciated by this Court in other contexts make clear that the notion of "natural monopoly" may not be so lightly invoked to regulate speech. Resolution of this issue is critical to the development of cable technology in this country, and the Court should take the opportunity to resolve this conflict.

The court of appeals also narrowly circumscribed the scope of political conduct protected by the *Noerr-Pennington* doctrine. The court characterized TCI's conduct as a "sham", and upheld a jury finding that TCI's actions were not protected by the doctrine pursuant to an instruction that removed from *Noerr-Pennington* protection any conduct that included any form of "threats", "intimidation" or "coercion". This permitted the jury to punish TCI for aggressive lobbying of government officials that did not meet with the jury's approval. This decision is not only flatly inconsistent with this Court's prior holdings, it also pits the Eighth and Ninth Circuits' narrow view of *Noerr-Pennington* against the more expansive interpretations adopted by the Seventh and Tenth Circuits. The danger to the dynamics of our political system caused by too quickly categorizing unpopular lobbying as "sham" tactics should be readily apparent, and requires this Court to end the existing confusion over the scope and application of the *Noerr-Pennington* doctrine.

**1. The 1980 Cable Television RFP**

TCI, which had managed the system for the prior owner, purchased the system in 1978 with the consent of the City, and thereafter made both improvements and major capital additions to it. Yet, in December 1980, the City Council resolved to obtain "bids" for the *de facto* exclusive right to serve Jefferson City with cable television once TCI's license expired in April 1981. Prospective applicants, including Central and TCI, were sent copies of a Request for Proposals ("RFP").[3]

The RFP outlined a procedure for applying for "the franchise" and indicated that only one bidder would be given a franchise.[4] The RFP established guidelines regarding programming, required bidders to disclose their programming

[3] The RFP was not a true bidding or auction process because the "highest bidder" was not guaranteed the franchise. Rather, based on the proposals, the City would choose one company with which to negotiate the details of the ultimate license. Thus, the potential publisher was to be chosen by the City Council based on a standardless, subjective process.

[4] The City Attorney, Thomas Graham, later emphasized that no one would be allowed to operate a cable television business in the City after April 21, 1981, without a franchise obtained through the RFP process.

intentions and philosophy, and required that the City be given control of several channels. It also prohibited any advertising by applicants designed to influence the RFP process. It soon became clear that only Central and a company called Teltran wished to participate in the City's RFP process.

TCI believed it had a right, protected by the First Amendment, to remain in the market. Therefore, TCI's representatives attended a January 19, 1981 City Council meeting to explain that, while TCI would not object if other competitors entered the market, it was determined to exercise its right to remain in the market as well.

In March 1981, Central and Teltran responded to the RFP. TCI filed a proposal but made clear that it would not respond to the RFP as formulated.[5]

To confirm its constitutional right to remain in operation, TCI filed suit in federal court in the Western District of Missouri on March 16, 1981, seeking damages and an injunction to restrain the City from interfering with TCI's operations.[6] The case was assigned to Judge Scott O. Wright, who also presided over the trial of this action. During the litigation, TCI subpoenaed George K. Baum & Company, the company working with Central to obtain financing for the cable system, seeking documents relating to Central's proposed financing.

**2. The Revised RFP**

In June 1981, Thomas Utterback became City Counsellor, replacing the City Attorney. In October 1981, the City requested TCI, Central and Teltran to update their proposals. The City also stated that it would negotiate privately with each company. TCI took the position that any meetings with the City would be in the context of negotiating a settlement of its lawsuit. On October 28, 1981, Teltran withdrew its application.

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[5] TCI indicated that: "Many of the provisions of the above-described proposed ordinances call for a waiver by TCI . . . of Constitutional rights . . . . It is the view of the Company that it cannot be required to waive these rights as a condition to conducting a lawful cable television business . . . . Hence the limited nature of TCI's proposal."

[6] The relevant parts of that complaint are printed in the Appendix at pages 88a-93a. TCI did not seek relief that would exclude others from the marketplace.

A City Council subcommittee and the City Counsellor met separately with TCI and Central prior to making their report to the full Council on January 4, 1982. The subcommittee advised licensing only one cable company. It recommended that the City negotiate first with TCI, and then, if the negotiations failed, with Central.

On January 25, 1982, though the TCI suit against the City was pending, and despite the contrary recommendation from its own subcommittee, the Council voted to pursue negotiations only with Central. The Council's vote immediately spurred a vigorous public debate. A front-page editorial in a local newspaper criticized the Council for its tentative selection of Central to the exclusion of TCI and called upon citizens to make their displeasure known to Council members. In response, Central (at the insistence of a beleaguered Council) placed an advertisement defending the Council vote, and urging citizens to "[l]et the city council know that you resent the threats and intimidations that have been directed towards them".

TCI responded with public statements of its own.[7] As the public debate reached a crescendo, TCI stated publicly that in view of the City's policy requiring a franchise, if TCI's license were not renewed it would shut down its system at the expiration of its term, leaving Jefferson City residents able to view only a few broadcast television stations for six to twelve

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[7] For example, TCI placed an advertisement in the Jefferson City *News & Tribune* on February 7, 1982 that stated:

TCI SIMPLY WANTS TO COMPETE

. . . .

TCI has no objection if the City enters into contracts with competitors of TCI, but feels that it, too, has a right to do business in Jefferson City.

. . . .

If both companies are afforded an equal opportunity to do business, you the citizens can select the company with which you desire to do business, and which you believe furnishes a better service at better rates. TCI has competed successfully in other cities and is confident it can so compete here if it has the opportunity to do so.

months while Central attempted to construct its own cable system. This proved to be the turning point in the controversy.[8]

On February 10, 1982, Judge Wright, on the City's motion to dismiss, ruled that each count of TCI's complaint, including its First Amendment claims, stated a proper claim for relief. Subsequently, TCI withheld the annual license fee otherwise due to the City as a set-off against the damages it sought in its suit. By agreement with the City those funds were placed in an escrow account pending the outcome of TCI's suit.

**3. The Renewal of TCI's License**

The cable television issue was taken up again at the April 5, 1982 Council meeting. "[I]n order to answer public outcry as to why the Council has not given TCI a chance", the Council voted to negotiate with TCI and, if the negotiations failed, "then they have lost". The Council also passed the "regulatory ordinance" negotiated with Central—however, a bill actually awarding the franchise to Central was tabled.

From April 12 to 15, 1982, members of the City Council, Utterback and Mayor Hartsfield negotiated with representatives from TCI and its counsel of record in its suit against the City. On April 16, 1982, Mayor Hartsfield announced an agreement with TCI on a regulatory ordinance and settlement of the lawsuit against the City. Hartsfield later indicated he would veto any ordinance granting a franchise to Central *alone*.

At the April 20, 1982 Council meeting, notwithstanding the negotiations with TCI, one councilman reintroduced the bill granting the franchise to Central. The bill was passed by a vote of 7 to 3. Mayor Hartsfield vetoed the bill stating "[t]here exists no justification for this award at the exclusion of [TCI]". A veto override (requiring 7 votes) failed when three councilmen who had voted for the bill did not vote to override.

The TCI regulatory ordinance was then introduced and passed when the Mayor cast the tie-breaking vote. TCI was

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[8] Central characterized TCI's service interruption message as a threat in its closing argument and continued to make the point on appeal, contending that "the record establishes that Central's inability to guarantee uninterrupted cable service directly caused Central to lose the franchise".

voted (6-4) a seven-year franchise. TCI thereafter dismissed its action against the City and paid the 1981 franchise fee.

Mayor Hartsfield testified that he vetoed the franchise for Central because of political pressure from constituents who feared an interruption of service. Councilmen testified that they were deluged with citizen complaints who feared that if TCI's franchise were not renewed, their cable television service would be interrupted during the period required for installation of Central's equipment.

**4. Proceedings Below**

On February 22, 1983, Central sued TCI and the City. (The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1337, and 1343 and Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15, 22; Central's claims asserted pursuant to the common law of Missouri were heard as pendent state claims.) Before trial, Central settled with the City.

At trial the jury returned verdicts for plaintiff and assessed compensatory antitrust damages of $10,800,000 and, on the state law claim, the same compensatory damages and $25 million in punitive damages. (App. 84a)

On June 5, 1985, the trial court denied TCI's motion for judgment notwithstanding the verdict. (App. 38a-71a)

TCI filed a timely appeal raising several issues, including those that are the subject of this Petition.

1. Central recovered for loss of its "right" to obtain an exclusive license to speak through the cable medium in Jefferson City—a property right that TCI claimed could not exist consistent with the First Amendment. The court of appeals held that an exclusive cable franchise was a constitutionally protectable interest. Acknowledging the "profound first amendment implications inherent in the regulation of cable operators" (App. 9a), and in the absence of any finding of physical inability to accommodate two cable systems, the court nevertheless endorsed the view that cable should be compared to the broadcast medium, in that a greater intrusion by government can be countenanced. (App. 5a-9a) From that

premise the court proceeded to find as a matter of law that the existence of a "natural monopoly", *i.e.*, economic conditions in which only one entrant may ultimately survive in the market, overcomes any First Amendment prohibition on exclusive licensing. The court's only explanation for such a finding was that the exclusive licensing process was the only way the City could "create competition *for* its cable television market". (App. 10a) (emphasis supplied) The court did not provide any analysis as to how economic scarcity could justify such suppression of speech by the City, or what public interests were served by limiting the number of cable publishers, or why competition *in* the market was not possible (other than Central's refusal to compete). It merely relied upon similar conclusory statements by the Courts of Appeals for the Seventh and Tenth Circuits (while giving scant regard to the opposing views of the Ninth and D.C. Circuits). Noting that Central's proposed system would be more up to date than TCI's existing system, and therefore "went further in advancing the first amendment interests of the viewing public in the greatest variety of programming obtainable", the court also concluded that TCI's asserted right to remain in service would not "enhance" First Amendment values. (App. 11a)[9]

2. Although TCI requested the court to review the record below on the First Amendment question under the standards required by this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), the court of appeals did not undertake an independent review, nor did it explain why it was refusing to do so. Instead, it merely accepted an implied finding by the jury of natural monopoly.

3. TCI maintained on appeal that even if its actions could be found to have an anti-competitive purpose and effect, the conduct challenged by Central was protected by the *Noerr-Pennington* doctrine and, therefore, could not result in liability

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[9] As an alternative holding, the court of appeals found that the evidence supported a finding by the jury that "TCI was not sincere in advocating competition in the market but simply sought to retain a monopoly", and presumably thereby lost its right to assert any defense based on the First Amendment. (App. 4a, 11a)

under the Sherman Act or state tortious interference law.[10] The court of appeals held that TCI had an absolute right to turn off its system at the expiration of its license and to refuse to sell its system to Central. (App. 16a) Yet the court upheld a charge to the jury that declared lobbying that includes "threats", "intimidation" or "coercion" (App. 19a) to be outside the protection of the *Noerr-Pennington* doctrine (without any indication to the jury that the threat to discontinue service was protected conduct as a matter of law). The court found that TCI engaged in other "excessive and intimidating conduct", by which it "sought to distort the [RFP] process" in: (i) refusing to participate in the RFP; (ii) attempting to interfere with Central's financing; (iii) withholding a past due franchise fee; and (iv) coercing City officials into holding private negotiations in alleged violation of the RFP and Missouri sunshine laws. (App. 24a-25a) The court of appeals held that these actions, unlike the service termination threat, were beyond the scope of *Noerr-Pennington* protection.

## REASONS FOR GRANTING THE WRIT

### I. THE FIRST AMENDMENT—WHICH PRECLUDES EXCLUSIVE CABLE TELEVISION LICENSING BASED UPON ECONOMIC CONSIDERATIONS—RENDERS UNCONSTITUTIONAL THE INTEREST UPON WHICH CENTRAL RECOVERED.

Central recovered more than $35 million for loss of a purported interest to be the *only* cable speaker in Jefferson City. TCI maintains that the Constitution prevents this type of winner-take-all political licensing process for the right to expression through the cable medium, and thus Central had no legally protectable interest upon which to base its claims. The constitutional right to publish does not encompass the right to be the exclusive publisher.

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[10] The one area of conduct not protected under *Noerr-Pennington* involved alleged threats by a TCI employee to an independent consultant to the City and to executives of Teltran. The court of appeals held that the jury could have found that those threats had caused Central's loss of an exclusive license. That holding, however, ignored rulings of this Court on the use of circumstantial evidence, which precluded such a finding (*see* Section IV, *infra*).

This Court has held that cable speakers are entitled to First Amendment protection. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2037 (1986). The Court left for another day the balancing of "competing societal interests" against the First Amendment interests of cable speakers to determine the precise limits of that protection. *Id.* at 2038. This case affords the Court, on a record developed at trial, the opportunity to resolve a conflict among the courts of appeals as to whether a government's desire to address perceived natural monopoly conditions in a market can constitute a societal interest adequate to overcome a cable television publisher's First Amendment right to serve that market.

### A. The Court of Appeals Erred in Reviewing TCI's First Amendment Defense by Applying to Cable Television Standards Applicable Only to Government Regulation of Broadcasting.

The Eighth Circuit posed the question of First Amendment protection for cable speech in black and white terms, as "whether cable television should be analyzed under the standards applicable to newspapers or those applicable to broadcasters". (App. 5a) Newspapers have been historically free of government regulation which might infringe upon their First Amendment rights,[11] whereas broadcasting entities are subject to some government regulation, including regulation of access to the market, due to the physical scarcity of the airwaves.[12] The Eighth Circuit, ostensibly following the lead of the Seventh and Tenth Circuits in *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982), and *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982), found cable to be "more analogous" to broadcasting than newspaper publishing, and thus subject to the same intrusive degree of

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[11] *E.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974).

[12] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396-400 (1969); *see also FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

regulation.[13] The court's decision made no attempt to analyze whether there was any physical scarcity basis for regulation or whether less intrusive regulation might adhere to the new technology at issue.[14] The court erroneously assumed that if cable is not wholly analogous to newspapers, then the same less stringent standard of First Amendment review of government regulation applies as in the broadcasting field.

That ruling places the Eighth Circuit in disagreement with the District of Columbia and Ninth Circuits.[15] Those courts have refused to compare cable to broadcast television, because the rationale under which the broadcast medium is subject to more intrusive government regulation—the inability of the airwaves to accommodate all prospective users—has no application to cable. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1444 n.22, 1448-50 (D.C. Cir. 1985) ("the standard of First Amendment review reserved for occupants of the physically

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[13] The Eighth Circuit earlier had observed that government "authority to intrude upon the First Amendment rights of cable operators . . . is less, not greater than its authority to intrude upon the First Amendment rights of broadcasters." *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

[14] The poles in Jefferson City are owned by United Telephone Company. Under a so-called "strand agreement", TCI leases from the telephone company the use of a strand attached to those poles for coaxial cable support. There is no technical or legal reason why two or more cables cannot be lashed on a single strand, and the telephone company—not TCI—has complete control over decisions to lease the use of the strand to others or to provide a separate strand. Either option was available to Central.

[15] The Eighth Circuit is also in conflict with dicta of this Court in *Preferred*. While declining to set the precise limits of cable speakers' First Amendment protection on the record before it, 106 S. Ct. at 2038, the Court nonetheless likened cable television to print media, noting that cable "partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers". *Id.* at 2037. Certainly the *Preferred* decision indicates that each technology must be analyzed separately and may fall somewhere between the ends of the spectrum, *i.e.*, between broadcasting and newspapers. Even *Omega Satellite*, on which the Eighth Circuit based its decision in part, recognized that the "physical scarcity" rationale has no place in cable analysis. 694 F.2d at 127.

scarce airwaves is plainly inapplicable" to cable), *cert. denied*, 106 S. Ct. 2889 (1986); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403-04 (9th Cir. 1985), *aff'd*, 106 S. Ct. 2034 (1986).[16]

Moreover, the Eighth Circuit's view has recently been implicitly criticized by the Federal Communications Commission itself, which noted "the unsettled nature of the law" regarding cable speakers' rights under the First Amendment, and concluded that "[w]e do not find that the rationales for applying [to cable] a lower First Amendment scrutiny standard analogous to that adopted for broadcasting . . . are persuasive or are sufficiently likely to prevail on review that regulation should be based thereon."[17]

There is thus a clear conflict among the Circuits as to the application of the broadcast standard of allowable government regulation to a cable speaker's First Amendment rights—a conflict that will continue to cause uncertainty and confusion for cities and cable speakers in litigation throughout the country.[18]

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[16] *See also Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (Bork, J.) ("Employing the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results.").

[17] Report and Order in the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, November 28, 1986, MM Dkt. No. 85-349 ("FCC Report and Order"), at ¶ 184. As noted in *Quincy*, the President's Cabinet Committee on Cable Communications and the Sloan Commission concluded that "the analogy [of cable] to more traditional media is compelling". 768 F.2d at 1450.

[18] *See, e.g., Century Federal, Inc. v. City of Palo Alto*, No. 85-2168, slip op. at 2, 20-23 (N.D. Cal. Dec. 3, 1986) (App. 102a-03a, 115a-18a), decided after the Eighth Circuit's decision in this case. The district court rejected the Eighth Circuit's analysis and held that "cable television is more closely analogous to newspapers than the broadcast media" and therefore cable speakers are entitled to the full protection of the First Amendment; *see also* FCC Report and Order at ¶ 184 (noting the "unsettled nature of the law in this area"). In addition to *Century Federal*, there are currently a number of cases pending that involve this issue. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986) (remanded); *Pacific West Cable Co. v. City of Sacramento*, 798 F.2d 353 (9th Cir. 1986);

By granting the Petition, the Court will be able—on an evidentiary record as to the nature of cable speech, technology and economics—to make clear to the lower courts that the relaxed standard of First Amendment review for broadcasting is not an appropriate standard by which to judge government regulation of cable television.

**B. Under Any View of Cable Speakers' First Amendment Rights, "Natural Monopoly" Cannot Justify The Exclusive Licensing of Speech.**

This Court has already flatly rejected the "natural monopoly" argument as justification for curtailment of First Amendment rights. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court held that the tendency of daily newspapers to occupy monopoly positions in their distribution areas could not justify a statute obligating newspapers to provide space to potential candidates for office criticized by the papers. That holding was not based upon any peculiarities of the newspaper publishing business, but upon fundamental First Amendment principles. The D.C. Circuit recently held that there is no meaningful distinction between cable television and newspapers on the issue of economic scarcity, *Quincy*, 768 F.2d at 1450, while the Ninth Circuit has indicated it will rule the same way. *See Preferred*, 754 F.2d at 1404-05; *see also Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1055-56 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). The Court can now take the opportunity to make clear that, whatever the precise level of First Amendment protection ultimately accorded cable tele-

*Nor-West Comm. v. City of St. Paul*, 802 F.2d 462 (8th Cir. 1986) (remanded); *Best View Cablevision, Inc. v. City of Abbeville*, No. 85-1159 (4th Cir. Aug. 13, 1986) (remanded); *Nation Wide Cablevision, Inc. v. United States*, C 86-1751 (W.D. Wash. filed Oct. 29, 1986); *City of El Segundo v. Group W Cable, Inc.*, No. CV 86-5029 DT (C.D. Cal. *removed from* Cal. Super. Ct. Aug. 1, 1986); *Madison Cablevision, Inc. v. City of Morganton*, No. SH C 86-5 (W.D. N.C. July 9, 1986) (order retaining jurisdiction until resolution of state constitutional issue in state court); *Omega Satellite Products Co. v. City of Indianapolis*, No. IP-86-830-C (S.D. Ind. filed July 3, 1986); *Cox Cable Communications v. United States*, No. 86-79-1 MAC (M.D. Ga. filed Mar. 12, 1986); *Group W Cable, Inc. v. City of Santa Cruz*, No. C 84-7546 WWS (N.D. Cal. filed Nov. 29, 1984); *Pacific West Cable Co. v. City of Galt*, No. CIV S 83-1595 MLS (E.D. Cal. filed Dec. 22, 1983).

vision, the *Tornillo* principle as to natural monopoly and government regulation extends to cable speech.

Despite *Tornillo*, and its own earlier indications in *Midwest Video*, the Eighth Circuit held that an implied finding by the jury that the Jefferson City cable market is a "natural monopoly" was sufficient to justify the City's exclusive cable licensing scheme. (App. 10a-11a) It is the first appellate court to so hold. However, it also interpreted dicta from the Seventh and Tenth Circuits as supporting the view that " 'a natural monopoly' situation may justify an exclusive franchising scheme" (App. 7a-9a), citing *Omega Satellite Products Co., supra*, and *Community Communications Co., supra.*[19] This puts the Eighth Circuit, and, as their decisions are being interpreted, the Seventh and Tenth Circuits, in direct conflict with the positions of the District of Columbia and Ninth Circuits that "economic scarcity" cannot be used to justify curtailment of cable speakers' First Amendment rights. *Quincy*, 768 F.2d at 1449-50; *Preferred*, 754 F.2d at 1404-05.[20]

The Eighth Circuit has carved out a singular place for cable as the only medium of communication in which rights of expression are made to depend upon econometric calculations. Indeed, the court of appeals failed to recognize that even in the

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[19] A district court in *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976, 986-87 (D.R.I. 1983), *vacated and remanded for dismissal as moot*, 773 F.2d 382 (1st Cir. 1985), also used "economic scarcity" as a justification for intrusive governmental regulation of cable. The *Burke* court did not, however, address the question of exclusive licensing. Similarly, a district court in *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543, 547 (W.D. Ky. 1982), noted in dicta that cable "by nature, tends to be a natural monopoly".

[20] *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45-46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 507-09 (D. C. Cir. 1986), G. Shapiro, P. Kurland & J. Mercurio, *CableSpeech: The Case for First Amendment Protection* 122-26 (1983). This conflict has also generated confusion as evidenced by the Eighth Circuit's implication that the D.C. Circuit agrees with the position taken by the Seventh and Tenth Circuits. (App. 9a) The Eighth Circuit's reliance on *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985), to support its views on natural monopoly is totally misplaced. *See Century Federal*, App. 116a, n.15.

area of broadcasting, no court has suggested that if a market could economically support only one or two broadcast television stations, the FCC or local government could choose which two stations would be "permitted" to serve.[21] Thus, even if cable is more appropriately analogized to broadcasting than to newspapers—as the Eighth Circuit held—the invocation of "economic scarcity" or "natural monopoly" to curtail First Amendment rights is patently improper.

The Eighth Circuit doctrine is of such potentially dangerous application that it merits prompt examination by this Court. At a minimum, the Eighth Circuit's ruling means that whenever a city believes it can offer proof that a "natural monopoly" exists, the city can choose for its citizens who the cable licensee shall be—which, in turn, makes the constitutionally guaranteed right to speak dependent on an unhealthy and uncertain mix of politics and economics.

The First Amendment, no less than the antitrust laws, presupposes unimpeded competition in the marketplace to insure the airing of diverse views and to enable the public to choose the "ultimate winner" in serving the public.[22] Even assuming that cable service is often a natural monopoly, the First Amendment dictates that the choice of programmer and programming must be made by the marketplace—not by municipal officials creating an "unnatural monopoly".[23] The

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[21] As Professor Ronald Coase has observed with respect to broadcasting:

> [I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce . . . . It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.

Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

[22] *See Associated Press v. United States*, 326 U.S. 1, 20 (1945).

[23] Moreover, from a purely economic view:

> [E]ven if eventual monopoly is inevitable, competition provides an important guarantee that the winner will be the most efficient

possibility of temporary increases in inefficiency or cost is not a compelling reason for permitting government officials to pass judgment on the content of communications and the "character" of those who wish to communicate with potential subscribers to a cable system.

Fundamental liberties cannot be made to depend upon the ebb and flow of market conditions that are constantly changing—especially in an industry developing as rapidly as the provision of television programming.[24] The Eighth Circuit's ruling will require intricate economic proof and projections of market demand, entry barriers, and the relationship between size and production efficiency to attempt to determine the natural monopoly issue. That complex proof, and the assumptions on which it is based, will change over time, as such factors as local demographics, cable technology, and rates of economic growth change as well. Free speech should not depend on such shifting and uncertain factors. This Court recently noted that it

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> and responsive competitor, thus benefiting consumers during the period of competition and perhaps afterward as well . . . .

Owen, "Recent Developments in Cable Television Regulation", Regulatory Reform: Industry Regulation Committee Newsletter 5 (ABA Section on Antitrust Law, Dec. 1985, Vol. 1, No. 1).

From a diversity in speech view, the FCC has recently expressed concern about "local franchise practices that have protected cable systems from some types of actual or potential competition". FCC Fact Sheet Regarding Cable Carriage Decision, August 7, 1986, MM Docket No. 85-349, p. 2.

[24] As Judge (then Professor) Posner cautioned in 1969:

> To embrace regulation because an industry is today a natural monopoly and seems likely to remain so is to gamble dangerously with the future. To impose regulation on the basis of a prophecy that the industry will remain monopolistic forever may be to make the prophecy self-fulfilling.

Posner, *Natural Monopoly and Its Regulation,* 21 STAN. L. REV. 548, 636 (1969). Recent evidence of successful competition in other markets long thought to be natural monopolies—such as long distance telephone service and overnight mail delivery—raises serious questions about the historical claims that capital investment and scale economy considerations make cable a natural monopoly. *See, e.g.,* Owen & Greenhalgh, *Competitive Considerations in Cable Television Franchising,* 4 CONTEMPORARY POLICY ISSUES 69 (1986).

was not willing to risk the potential for error if rights at the heart of the First Amendment were to depend upon the complexities of factual economic proof. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 589-90 (1983).

Thus, whether the cable business is a "natural monopoly" in any locality must be irrelevant on the issue of whether municipalities can grant exclusive cable licenses. Monopolistic characteristics may arise only through competitive elimination *in* the market, not by a city-run license contest *for* the market, as endorsed by the court of appeals. If Central would have in fact provided a higher quality of programming and service than TCI, then Central could have built its system alongside TCI's and competed for viewers. For government to close the marketplace of ideas to all but one speaker, however, based on the assumption that the chosen speaker will provide the most desirable service, impermissibly usurps the role of the individual to choose for himself.

In addition, while the Eighth Circuit took comfort in believing that the regulation it was approving was not "content regulation" (App. 5a, n.4), exclusive licensing is inherently content-related, if not directly content-based.[25] When making the subjective determination of which publisher is best qualified to serve, there is great risk that municipal authorities will base their decision on the content of an operator's programming, even where the pertinent franchising ordinance purports to be "content neutral". Municipal officials can easily determine the nature of the programming carried by a given operator,[26] and

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[25] As noted in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 81 n.4 (1976) (Powell, J., concurring), one form of content-related regulation is the imposition of limits on the number of speakers.

[26] For example, municipalities can, as was done here, require prospective cable publishers to describe the nature and sources of their proposed programming and to describe their programming "philosophy".

Indeed, the court of appeals itself made the following evaluation of TCI's programming:

> TCI refused to provide other than an outmoded limited channel system whereas Central proposed a state-of-the-art system with far more channels at a lower cost, and, accordingly, more variety
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> . . .

can choose, for example, to favor an operator who carries the "Playboy Channel" over one who carries the "Disney Channel".[27] Under an exclusive licensing system, local officials may also be inclined to license an operator who will not cast as critical an eye over city government. The very prospect of such scrutiny by officials inevitably inhibits the editorial and journalistic vigor of cable television programming.[28] Permitting the same institution that is being scrutinized, here, the municipality, to lessen the number of media voices by restricting electronic publishers to one, and that one chosen by the municipality, severely hampers the ability of the press to accomplish its special task.[29]

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> of programming for the public. *It is difficult for us to see how, on this record, TCI's position enhances first amendment values* . . . . [I]t seems clear that Central's proposal went further in advancing the first amendment interests of the viewing public in the greatest variety of programming obtainable. (App. 11a, emphasis supplied; *see also* App. 2a-3a, 15a, n.9 (citing evidence of the superiority of Central's *proposed* system), 19a, n.11)

However, it was not for the City, not for a jury, and not for the courts to decide that TCI's acknowledged First Amendment rights may be curtailed based on a subjective *post hoc* determination that its cable service is not the "best" for the community.

[27] *See* Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867, 922 (1983); *see also Cruz v. Ferre*, 755 F.2d 1415, 1422 (11th Cir. 1985).

[28] *See FCC v. League of Women Voters*, 468 U.S. 364, 408 (1984) (Stevens, J., dissenting) ("The court jester who mocks the King must choose his words with great care.").

Historically, incumbent cable operators seeking renewal, faced with the specter of a distress sale of their system should renewal not be granted, have been at the mercy of municipal franchising authorities. The Cable Communications Policy Act of 1984 (47 U.S.C. §§ 546, 555) has made it more difficult for cities to revoke existing licenses and provides for judicial review of any decision not to renew. However, the expense and time involved in a contested renewal proceeding still gives enormous leverage to the city government.

[29] *See FCC v. League of Women Voters*, 468 U.S. at 378-379. As the Court of Appeals for the Second Circuit has noted: "The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion." *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 733 (1985) (rejecting "natural monopoly" argument as reason to limit access to means of disseminating electronic information).

The court of appeals also rejected TCI's First Amendment argument on the ground that TCI was not "sincere" in its stated position that it would not object to the grant of a franchise to Central as long as its own license were also renewed. (App. 4a, 11a) TCI's desire (or not) for competition, however, is of no relevance to the constitutionality of Central's asserted property interest. It is difficult to fathom how TCI's lack of sincerity in accepting competition could render constitutional an otherwise unconstitutional property interest. In any event, Central has never lost its constitutionally protected interest in a *nonexclusive* franchise, regardless of TCI's alleged secret desire to maintain the only franchise.[30] Central appeared to have the required Council votes to obtain a franchise to compete with TCI, but declined to seek such a license. Even if TCI controlled the City Council (an assertion which was never proved, and which would seem to be conclusively refuted by the Council's conduct), Central could have sought judicial relief to enforce its First Amendment right to operate in Jefferson City. Central in fact sued the City in this action, alleging a First Amendment claim virtually identical to TCI's First Amendment defense (App. 95a-96a), but did not seek an order requiring the City to grant it a license to serve the City alongside TCI.

## II. THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW.

In cases such as this, where First Amendment rights are at stake, this court has counselled the courts of appeals to independently review the evidence. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984). Thus, even assuming that the purported existence of "natural monopoly" were a relevant factual dispute, the Eighth Circuit was obligated to review the record in light of *Bose*. The court

[30] The court of appeals' citation to this Court's decision in *Associated Press v. United States*, 326 U.S. at 19-20, in support of its conclusion indicates that it misunderstood the thrust of TCI's First Amendment defense. (App. 4a, n.3) TCI is not claiming immunity from the antitrust laws. Instead it claims that even if Central had made out all the other elements required to prove a Sherman Act violation (or a violation of state tort law), the First Amendment renders the claimed injured property right—an exclusive cable television license— illegal, thereby defeating recovery. *See, e.g., Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 634 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

of appeals, however, did not address TCI's *Bose* argument. The court only stated that there was "substantial support" in the record for the jury's implied finding that the Jefferson City market was a natural monopoly, citing one study of the market introduced by Central. (App. 10a)

That failure is significant, not only for its disregard of this Court's instruction in *Bose*, but also because it places the Eighth Circuit in conflict with other courts that, citing *Bose*, have expanded the scope of "constitutional facts" requiring independent appellate review. *See Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 542 n.3 (3d Cir. 1984) (appellate court free to draw its own inferences from the record in a case involving constitutionality of student prayer group in public school), *vacated on other grounds*, 106 S. Ct. 1326 (1986); *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 897 (D.C. Cir. 1984) (allegedly deceptive poster advertisement); *Brasslett v. Cota*, 761 F.2d 827, 839 (1st Cir. 1985) (public employee's speech); *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 535-38 (9th Cir. 1984) (findings under *O'Brien* analysis in adult use zoning), *rev'd on other grounds*, 106 S. Ct. 925 (1986). If those courts are correct in their conclusion that *Bose* applied to the subjects before them, then the Eighth Circuit has created confusion, if not direct conflict, among the circuits as to the meaning of *Bose*.

An independent review of the record on the natural monopoly issue would require the court to consider the evidence that the lack of competition in the City prior to the expiration of TCI's first license was due to the City's abuse of the rate control provisions in that license. Moreover, undisputed evidence indicated a very high penetration rate of cable television in Jefferson City—nearly 80%—which made it a good market to support more than one system.[31] Central claimed that its system would have cost $2.5 million to construct; the jury fully adopted Central's damage theory and awarded it $10.8 million in compensatory damages, *i.e.*, a 432% return on total

[31] As the district court noted, "Jefferson City provides a very attractive market for cable television . . . . [C]able television's market penetration has been extremely high in Jefferson City". (App. 39a, n.3)

investment after three years of hypothetical operation. Indeed, based on the proposed equity contribution of plaintiff's shareholders to the system ($540,000), the rate of return was 2000%. Such a profitable market belies the existence of a natural monoply.[32]

The failure of the Eighth Circuit (as well as the district court) to evaluate independently the significance of this evidence put TCI's First Amendment rights solely in the hands of a jury grappling with sophisticated economic evidence. That result cannot stand under *Bose*.

## III. THE DECISION BELOW IS STRONGLY AT ODDS WITH THE *NOERR-PENNINGTON* DOCTRINE ESTABLISHED BY THIS COURT.

If exclusive licensing of speech is to be held constitutional based upon the concept of "natural monopoly", then the decision to grant speech rights is essentially a policy judgment committed to the political process, and the First Amendment guarantees a robust right to persuade government to act in one's favor.

In the antitrust context, this doctrine is recognized in the *Noerr-Pennington* doctrine. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).[33]

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[32] In *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986) (Posner, J.), the Seventh Circuit reversed a jury verdict awarding damages which were based upon a 191% rate of return, and also reversed the trial court's remittitur which reduced the rate of return to 42%. The court found that even at the lower rate the projected damages "bore no relation . . . to economic reality", and concluded that "[a] rate of return so far in excess of market rates of return would be a magnet *drawing productive resources into the market—and confronting Olympia with competition from far more experienced firms*". *Id.* at 382 (emphasis supplied).

[33] For purposes of this Section we assume that TCI's conduct could be found to be within the antitrust and tortious interference laws absent *Noerr-Pennington* protection. TCI, however, never had an exclusive cable license and it never campaigned for an exclusive license during the renewal process. TCI consistently took the position that it did not oppose other licenses being granted as long as its license were renewed. Therefore, TCI was not engaged in anticompetitive activity or monopolization, and did not tortiously interfere with Central's economic expectations.

This Court in *Noerr* determined that, in order to insure the right to petition, occasionally unethical and unsavory activity would have to be countenanced. The Court noted that in the "no-holds-barred" battle between the trucking and railroad industries for "control of a profitable source of income":

> [E]ach group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, *except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.* 365 U.S. at 144-45 (emphasis supplied, footnotes omitted).

Thus, *Noerr-Pennington* protection extends even to an activity that falls outside "normally accepted" political conduct—*e.g.*, the deliberate deception of public officials—but that nonetheless constitutes clearly "political activity" designed to achieve government action. *See id.* at 140-42. *Compare* App. 19a, n.11.

The Eighth Circuit's interpretation of the scope of the *Noerr-Pennington* doctrine in this case constitutes a severe narrowing of the arena of protected political activity and an unwarranted expansion of the scope of the "sham" exception to the doctrine, contrary to this Court's decisions. Moreover, the decision conflicts with rulings in other circuits involving similar circumstances. *See Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Rural Electric Co. v. Cheyenne Light, Fuel & Power Co.*, 762 F.2d 847, 850 (10th Cir. 1985), *aff'g*, 602 F. Supp. 105, 108-09 (D. Wyo. 1983). The ruling in this case is symptomatic of the problems lower courts are having applying the *Noerr* line of decisions without further guidance from this Court.[34]

The issue raised by this Petition presents to the Court an

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[34] Although this Court has considered cases involving *Noerr-Pennington* questions since *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), it has not within the past 14 years clarified the parameters of antitrust immunity in the legislative setting, including the scope of the "sham" exception.

opportunity to provide clear guidance to the lower courts on the application of the *Noerr* principle and the "sham" exception—an area which one commentator, as early as 1977, described as "difficult" to apply and "plagued by considerable confusion".[35] The subsequent decade has not seen the confusion and difficulty abate.[36]

This case involves a heated political dispute concerning the cable television franchising process, fueled by opposing positions taken by Central and TCI, as well as divisions within the City Council. During the more than a year in which the RFP process wore on, TCI, *and* Central, *and* the City all apparently engaged in activity about which none of them can be very proud, judging from the accusations and counter-accusations which were made by the parties. However, the Sherman Act was not designed as a general code of ethics governing political, as opposed to economic, activity. *See Noerr*, 365 U.S. at 140-41. Yet the Eighth Circuit, by interpreting *Noerr* to immunize only activities that "provide the City with information on which

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[35] Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80, 104 (1977).

[36] *See, e.g., Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 813 (2d Cir. 1983) ("To be sure, the contours of the sham exception [to *Noerr-Pennington* protection] are far from clear; the courts have themselves had difficulty defining the doctrine."), *cert. denied*, 464 U.S. 1073 (1984); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1155 (7th Cir.) (the *Noerr* and *Pennington* cases give little definition of what activities are sham, *i.e.*, not petitioning in the legislative and executive settings), *cert. denied*, 464 U.S. 891 (1983).

Moreover, many courts have held that, under *Noerr*, the Sherman Act was not intended to regulate political conduct at all, and thus the independent illegality of such conduct is irrelevant to the doctrine's application. *See, e.g., Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390 F. Supp. 696, 701-02 (D. Colo. 1975) (bribery and illegal campaign contributions are not subject to antitrust sanctions just because they are illegal); *Schenley Indus., Inc. v. N.J. Wine & Spirit Wholesalers Ass'n*, 272 F. Supp. 872, 885-86 (D.N.J. 1967) (lobbying activities that are illegal independent of the Sherman Act are "irrelevant for antitrust purposes"); *Blank v. Kirwan*, 39 Cal. 3d 311, 325-28, 703 P.2d 58, 67-69, 216 Cal. Rptr. 718, 726-28 (1985) (antitrust laws inapplicable even if bribery shown).

to base a reasonable choice" (App. 20a, n.11), has in effect established just such a code—one that requires a standard of conduct in the political arena that is unsupportable under this Court's precedents.

For example, the court of appeals approved a jury instruction that permits antitrust liability to be imposed upon a finding that a defendant has engaged in conduct that includes any form of "threats", "intimidation" or "coercion":

> In deciding whether defendants engaged in any unlawful conduct in this case, you are instructed that you may not consider defendant's legitimate lobbying efforts with the Jefferson City officials. The defendants are entitled under the law to use genuine efforts to influence public officials *but if in fact defendant's lobbying activities included threats, intimidation, coercion or other unlawful acts,* then you may find that such activities were not genuine efforts to influence public officials and you may consider those acts to have been unlawful conduct. (App. 19a, emphasis supplied)

The italicized language in the instruction excludes all "threats", "intimidation", or "coercion" from conduct protected under *Noerr,* thereby adopting the Ninth Circuit's narrow view of the doctrine. *See Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150,* 440 F.2d 1096, 1099 (9th Cir.) ("there can be little reason to extend the special immunity of *Noerr* and *Pennington* to a type of 'communication' which includes threats and other coercive measures. There is no room for such tactics in a democratic system."), *cert. denied,* 404 U.S. 826 (1971).

As *Noerr* demonstrated, however, political lobbying often involves activity which, depending on one's perspective, can easily be characterized as "threats", "intimidation" or "coercion". For instance, the court of appeals recognized that TCI's public announcement that it would turn off its system if its license were not renewed (thereby depriving the City of most television reception for an extended period) was protected conduct. (App. 16a) Yet, this statement obviously constituted a "threat", which certainly "intimidated" City officials and

residents, and in the end was a determinative factor in "coercing" the City to renew TCI's franchise. *See* pp. 6-8, *supra.* Similarly, the trial court's instruction let the jury impose liability on the basis of "misstatements of fact" (App. 14a) that might have "intimidated" various persons. While it is not clear if such deception is within *Noerr* when it occurs in the adjudicatory context (*California Motor Transport Co., supra*), it is clearly protected in the legislative arena, where TCI's conduct was directed.

Moreover, the challenged instruction permitted the jury to apply its own sense of moral rectitude to TCI's conduct, and to punish conduct which should be protected under *Noerr-Pennington.* For example, the court found that the jury could have assessed liability on the basis of TCI's withholding of the franchise fee owed to the City as a set off against damages recoverable in TCI's suit against the City. (App. 24a)[37] This was not illegal, and was at most a form of economic coercion on the City. In terms of the antitrust laws, this should stand on no different footing than a threat to withdraw campaign contribution pledges if the official refuses to vote in the manner desired by the contributor.[38]

The court of appeals has blurred the demarcation previously set by this Court between acceptable and unacceptable political conduct, and relegated the right to petition to activity a jury later finds to be "legitimate lobbying".[39] Such a broad

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[37] Although Central initially claimed that TCI's suit against the City was a "sham", it withdrew that claim just before the case went to the jury.

[38] *See Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers,* 542 F.2d 1076, 1081 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977). The court also found liability supported by the implied jury finding that TCI's negotiations with the City violated Missouri's "sunshine" laws (although the jury was never instructed on the sunshine law). (App. 24a) This is the first court to hold that a violation of state procedural laws incurs antitrust liability, or that the Sherman Act was designed to police enforcement of such laws.

[39] Indeed, the confusion existing over where the line of acceptable conduct is crossed under *Noerr-Pennington* is illustrated graphically by the fact that the Eighth Circuit itself had previously ruled that the same type of conduct condemned here was within the

sweep cannot square with this Court's prior teachings on the subject.

The Eighth Circuit's treatment of the *Noerr-Pennington* doctrine in this case is also at odds with decisions by the Seventh and Tenth Circuits.

The Seventh Circuit in *Metro Cable, supra,* examined allegations of an antitrust conspiracy brought by the loser in a battle for a city cable franchise in Illinois. The plaintiff alleged that the defendants, including the mayor and a city alderman, agreed to prevent plaintiff from operating a cable system in the city. For their part in the agreement, the city officials received "substantial" campaign contributions. During the campaign, the plaintiff was denied a hearing and defendants willfully misrepresented facts to the city's planning and finance committee. 516 F.2d at 222-23. The court of appeals affirmed the dismissal of the complaint. The court held that since the action of the city council was lawful, "concerted efforts to induce [that action]" cannot support an antitrust violation

> if those efforts were genuinely aimed at inducing the governmental actions and were not a pretext for inflicting on plaintiff an injury not caused by any governmental action. Unlike the injury to plaintiffs in *California Motor Transport,* the injury [here] . . . was caused by the governmental actions of the city council which the defendants genuinely and successfully attempted to induce the city council to take. *Id.* at 229.[40]

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protection of the doctrine. *See, e.g., Mark Aero, Inc. v. Trans World Airlines, Inc.,* 580 F.2d 288, 296 (8th Cir. 1978) (campaign to induce government officials to refuse to take action favorable to a competitor shielded by doctrine even though allegedly accompanied by misrepresentations and "economic coer[cion]"); *Missouri v. National Organization for Women, Inc.,* 620 F.2d 1301, 1314-19 (8th Cir.) (use of economic boycott protected; *Noerr* protection extends to state law claims of tortious interference), *cert. denied,* 449 U.S. 842 (1980).

[40] The court also ruled that the alleged participation of the mayor and alderman did not take the case out of *Noerr's* protection. *Id.* at 230. *Accord, Rural Electric,* 602 F. Supp. at 109 ("Even if the conduct of various of the Defendants was unethical in interacting . . . [with] the City Council, such activity is also immune from suit under the antitrust laws when conducted in the context of lobbying the City Council as a legislative body.").

Clearly, the *Metro Cable* complaint would have survived attack under the Eighth Circuit's view of the *Noerr* doctrine. This is particularly true since the court of appeals also found that TCI's activities constituted a "sham" outside *Noerr-Pennington* protection because TCI's real purpose was to "extend" its "monopoly position", not to genuinely influence government. (App. 19a, 24a, n.14) The Seventh Circuit specifically held that even if there was a more general plan by defendants to achieve a monopoly for the defendant broadcast television station by warehousing the exclusive cable franchise for the city, "[t]he part of that overall plan that consisted of inducing the city council to grant [defendant] CATV a franchise *and to refuse plaintiff a franchise* is not . . . within the Sherman Act. . . ." 516 F.2d at 232-33 (emphasis supplied).

Since there can be no legitimate dispute that it was the act of the Jefferson City Council in awarding TCI the franchise that Central claimed caused it "injury" by denying it an exclusive license, and that TCI's conduct was "genuinely" directed at having the council take that very action (even if one were to assume TCI intended to achieve a *de facto* exclusive license), the Eighth Circuit's decision conflicts with *Metro Cable.*

The Eighth Circuit's holding that TCI's conduct could be found to constitute a "sham" is equally at odds with the decision in *Rural Electric:*

> Areeda and Turner point out, however, that such allegations [of 'sham' conduct in the legislative process] are virtually impossible to prove, and may, for practical purposes, be ignored. [P. Areeda & D. Turner, *Antitrust Law* ¶ 203 (1978)]. They also point out an obvious fact of significance in this action. In attempting to categorize an activity as merely a 'sham' lobbying, hiding behind the most frivolous of contentions, it must be remembered that "in a political forum, almost no contention can be characterized categorically as frivolous. . . . [A] contention cannot, by definition, be frivolous when it is actually adopted by a legislature, administrator, or court." *Id.*, paragraph 203(c).

602 F. Supp. at 108-09, *aff'd,* 762 F.2d 847.

This Court has defined mere "sham" conduct as conduct that is not a "genuine" attempt to influence governmental policies. By applying the "sham" exception where TCI did not bar Central's access to the City Council, the Eighth Circuit has greatly expanded the scope of the "sham" exception well beyond the broadest tolerable reading of this Court's decisions.

## IV. THE EIGHTH CIRCUIT IMPERMISSIBLY ALLOWED THE JURY TO PRESUME CERTAIN CIRCUMSTANCES FROM WHICH TO INFER FACTS REGARDING PROXIMATE CAUSATION IN CONTRAVENTION OF THIS COURT'S PRIOR RULINGS.

In *Manning v. Insurance Co.*, 100 U.S. 693, 698 (1879), and *United States v. Ross*, 92 U.S. 281, 283-84 (1875), this Court held that where circumstantial evidence is used to prove a fact, the circumstances must be proved and not presumed. In other words, "inferences from inferences" and "presumptions resting on the basis of another presumption" are not permitted. *Ross*, 92 U.S. at 283.

At trial Central offered evidence that a TCI executive, Paul Alden, threatened the City's consultant and executives of Teltran.[41] However, the consultant still recommended TCI's competitors, and there was no evidence that Alden's threats *caused* Teltran to withdraw from the RFP. Hence, there was no showing that Alden's acts *caused* Central any harm. Nevertheless, the Eighth Circuit held, in a somewhat extreme example of *post hoc* speculation, that "the jury may have concluded that TCI's heavy-handed tactics frightened the mayor and some members of the City Council into awarding the franchise to TCI". (App. 16a) That ruling cannot stand in view of this Court's holdings in *Manning* and *Ross*.

The jury would have had to pyramid a number of inferences, in contravention to this Court's precedents, to reach a conclusion that Alden in any way affected the City's decision. It is undisputed that Central offered no evidence that Alden's threats were ever communicated to the Mayor or any City Council member. The jury would thus have had to infer that the knowledge of the City's attorneys who were told of the

[41] TCI did not contend that Alden's conduct was protected by *Noerr-Pennington*.

alleged threats in 1981 was conveyed to Mayor Hartsfield and, apparently, members of the City Council. Then the jury would have to infer that knowledge of this threat caused the Mayor and Council members to vote for TCI almost a year later. Whether the first inference is improper, the second inference clearly violates this Court's rule set down in *Manning* and *Ross*.

This Court should take the opportunity to reinforce the limits to which circumstantial evidence can be pushed. Those limits are designed to prevent injustice and their application is necessary here for precisely that reason.

## CONCLUSION

This case raises issues of great significance to a burgeoning new industry and to the nation at large. Those issues, involving free speech and the petitioning of local government, are entwined with values at the very heart of the Constitution. For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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